



Restriction on Land Ownership and Its Implications on Property Development in Malaysia

Adibah Awang, *M.Comp. Law (IIU, M'sia), A.D.I.L. (ITM), D.I.L. (ITM)*
*Lecturer, Department of Property Management & Valuation, Faculty of
Surveying,
Universiti Teknologi Malaysia, Johor, Malaysia.*

Keywords : Conditions - restrictions in interest - categories of land - national development strategies - land utilisation priorities - restriction on foreign ownership - Foreign Investment Committee

Abstract

The powers to impose conditions and restrictions on landownership in the country is governed by various laws and policies, the main law being the National Land Code (hereinafter referred to in its abbreviated form as "NLC") i.e. a uniform land law applicable to all the eleven states in Peninsular Malaysia. Such restrictions are viewed in this paper as a discouraging factor to those who are engaged in property development and, also as a safeguard to the citizens of Malaysia who are without land. As the content of this paper is based on a study on land ownership in Johor Bahru, an area where property development has been in the highest graph since 1980's, therefore it may represents the other areas throughout Malaysia which have experienced such development per se. Johor Bahru is the capital city of the state of Johor which is situated at the southern tip of Peninsular Malaysia. Its proximity to Singapore is one of the factors which has contributed to its rapid economic development especially in its property sector. The Johor Bahru property market have attracted the Singaporeans especially its residential and agricultural properties, as property prices there are cheaper by one third of the property prices in the Republic. As a result, property prices becomes out of reach for most of the citizens. The move to restrict foreign ownership of real properties recently, will have far reaching implications on the property industry as it is one of the major contributor to the continued buoyant growth of Malaysia. However, there is undoubtedly a need of achieving a balance between the importance of achieving its national development strategies on the one hand, and the need to safeguard local interests on the other. The writer hereby seeks to give an overview of the various restrictions impose by laws and policies on land ownership and its implications on property development in the country.

Introduction

Proprietorship of land by way of alienation from the State Authority, carries with it a bundle of rights such as the right in respect of the use and enjoyment of the land including the column of airspace above the surface of the land, the right to the support of land in its natural state by adjacent land and the right of access to the land but these rights are not absolute rights as they are subjected to the other provisions of the National Land Code 1965, and other written laws in force such as the Malay Reservation Enactments, Mining Enactments and the Land Acquisition Act 1960 etc. In other words, a registered proprietor of land under the Malaysian Torrens system merely have a limited right of ownership to his land in that he is not free to dispose or deal or use according to his whims and fancies but his rights are subject to various conditions and restrictions in interest imposed on the land by the State

Authority. As land is a "state matter", the State Authority is empowered not only to dispose or alienate land within its boundaries but also ascertained that its land use policy is abided. Failure to observe these conditions renders the land liable to forfeiture by the government without any compensation whatsoever. In addition, the NLC imposes various restrictions on his right to use the land or anything that is found thereon or therein as he deems fit. For instance he has no right to mineral or oil deposit in his land or to remove rock material as defined by the NLC from his land without a permit. Also his land can be subject to easements whether of right or of access. The land owners may also have to conform to the various requirements of the planning legislation which is responsible for the physical planning in local authority areas. Nevertheless, conditions attached to land titles prevail over planning restrictions. To avoid conflict, local authorities are consulted before the State grants land.

Thus, land legislation and planning laws govern and define the parameters of the land use policy of Peninsular Malaysia and within this parameters, it is the State Authority and the National Land Council which determine the context and thrust of the land use policy actually implemented. However, even though the Federal Constitution provides that land is a state matter, this does not give all the 11 State Government powers to make law and policy regarding land as they please as under Article 76(4) of the Constitution, Parliament may, for the purposes of ensuring uniformity of law and policy, make laws with respect to land tenure, the relationship of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land and local government. This means that with regard to the above matters mentioned only, Parliament make laws and these laws will come into force in the states without the necessity of it being adopted by the State Legislative Assemblies and the latter have no power to modify them. Thus, pursuant to this provision, the National Land Code was enacted and came into force on January 1, 1966 and for the first time in the history of Land Administration in Peninsular Malaysia, all states have a uniform land law.

Categories, conditions and restrictions in interest under the NLC

The powers to impose conditions and restrictions on landownership in the country is governed by the National Land Code. The nature and content of "express conditions" is inevitably considered as an integral part of the broader policy of "categories of land" to be decided at the time of alienation. It is trite law as well as established practice in the country that when State land is alienated by the State Authority, the land in question must fall under one of the three recognised categories - agricultural land, building land or industrial land. In practice, the "category" under which a piece of land has been alienated will not tell the owner everything. This shortcoming is made good by the mechanism of endorsing express conditions on the title, as well as the automatic application of "implied conditions" as set out in three important provisions of the Code - namely, section 115 (for agricultural land), section 116 (for building land) and section 117 (for industrial land). Thus, for example, State land may be alienated to ABC Sendirian Berhad (a private limited company) under the category of "agriculture", which is good in so far as it sets the land apart from the other two categories, but it does not tell the owner for what purpose the land can be used. By the administrative mechanism of endorsing "express conditions" on the title, the owner is then told that its agricultural land can only be cultivated for the purpose of growing a specific crop, say, oil-palm, cocoa, pineapple or whatever. Thus, "express conditions" and "categories of land" exists to complement and strengthen the other. This reflects the attempt to create a balanced and effective system of land tenure and land utilisation in the State. By adopting a long-range view of its alienation policy and implementing these two concepts prudently, the State Authority should be able to match the size of its present population, its available land mass, its land utilisation priorities, and the thrust of its own (local) as well as the national economic development strategies. It then becomes necessary to pose the question: is the law relating to categories of land, as presently contained in the Code adequate? It was recently announced in the media that Johor intends to build a RM450 million project known as the Best World Complex touted to be the "single biggest real estate development project by the private sector in the southern region", thereby making Johor Bahru "a shopper's paradise and a technopolis of the future". Would the law still be adequate to cope with that mammoth and innovative project, a proposed township built on water, which is expected to take at least a decade to complete?

There have also been suggestion that, in the like of the present obsession in the country to "go golfing", to consider adding a fourth category of land i.e. "leisure" to the traditional three categories (Salleh Buang, conference paper 1993). To take a current example, the Selangor State Government intends to develop a 200 hectare piece of land in Air Hitam, Petaling for equestrian sports in joint-venture with an Australian company. The integrated project contemplates a mixed development of horse breeding, marketing centre, an industrial complex making leather goods, and training grounds. The project is expected to commence soon and would be completed in 1995. Under the conventional practice, we could envisage the area of horse breeding to be under "agriculture", the marketing centre to be under "building", the factory to be under "industry"; but what would be the appropriate and ideal category for the equestrian/ training grounds?

Except for a short spell of time (when the NLC recognises four categories of land i.e. between 25th March to 31st May 1985), we have all along been used to the three categories of land. Most "conversion approvals" sought by owners of land have invariably been from the category "agriculture" to one or both of the remaining two categories; seldom, if ever, the other way round. Under the existing provisions of the Code, there are three alternative procedures in which such conversion approvals may be obtained (Dato' Zainal Abidin Noordin, Conference paper 1992). This diversity, unfortunately has led to varying procedures from one State to another, thereby at times causing confusion to entrepreneurs and legal practitioners alike.

Whilst the law and practice relating to "categories of land" and "express conditions" are applied uniformly by the authorities in all the States, the law relating to "restrictions in interest" gives more room for each State to manoeuvre within the range of its discretionary limits. It is free to decide what specific terms are to be endorsed on the title to meet the special or peculiar needs or interests of that State. For example, the restrictions in interest endorsed on land titles that it could not be transferred to a non-Bumiputra unless prior approval is obtained from the Johor State Authority, considered essential here, might not be resorted to by the other authorities in other states.

The general power of the State Authority to impose express conditions and restrictions in interest is provided under section 120 of the Code. The terms "conditions" and "restriction in interest" which usually appear together in the National Land Code, however, bear different meaning and have different legal implications. The term "restriction in interest" is defined in section 5 of the Code as meaning :

"...any limitation imposed by the State Authority on any of the powers conferred on a proprietor by Part Nine, or on any of his powers of dealing under Division IV, and any like limitation imposed under any previous land law".

The term "condition" does not include any restriction in interest (section 5 of the NLC) or any express or implied condition in any agreement in which the State Authority is not a party (section 103 (c) of the NLC). Therefore, a restriction in interest refers to any limitation imposed by the State Authority on the powers of the registered land proprietor on his land to subdivide, partition or amalgamate it, as well as the limitation on his powers to deal with it by way of transfer or the creation of a lease, charge, easement, tenancy, statutory lien, whereas, a condition relates to the manner to which the land is to be utilised for example the State Authority may impose express condition on agricultural land requiring the cultivation of a particular crop on it.

These conditions and restrictions in interest are determined by the State Authority at the time when the land is approved for alienation and must be endorsed on or referred to in the document of title of the land. Where both conditions and restrictions are so imposed, the State Authority must distinguish between the two (section 120 (3)) of the NLC.

The discretion of the State Authority to impose express condition and restrictions in interest in respect of alienated land is not fettered or controlled by law but merely based on political or socio-economic considerations. Section 120 (1) of the Code provides that :

"...the State Authority may alienate land under this Act subject to such express conditions and restrictions in interest

conformable to law as it may think fit" (emphasis added by the writer).

As has been pointed earlier, the State Authority have wide discretionary powers to impose any condition and restriction in interest which it thinks fit on the land to be alienated. However, the conditions and restrictions in interest imposed must be "conformable" to any other written law in force. Thus, when a State Authority, acting in accordance with its discretion, chooses to impose restrictions in interest (when approving the conversion and sub-division of a housing project) that 30% of the houses to be developed must be low cost units and can only be sold only to citizens born in that State, and the remaining 70% must be sold to Malaysian citizens, half to Bumiputra and the other half to non-Bumiputra, then question arise as to whether this "restriction in interest" run foul of the law, assuming that the National Land Code does not restrict the sale of units to non-citizens? Would this restrictions in interest be upheld by the court, if someone were to challenge them?

In Kin Nam Development Sdn. Bhd. v. Khau Daw Yau (1984) 1 MLJ 256, the developer had applied for conversion and sub-division approval to the Pahang State Authority in respect of a proposed housing development. Before approval was obtained, the developer had proceeded to sell some of the lots to individual purchasers, who were non-Malays. When the authorities finally granted their approval, the developer discovered, to his dismay, that some of the lots which he had pre-sold to the non-Bumiputra purchasers have been reserved for "Bumiputra purchasers". The developer did not appeal against the terms of approval granted by the authorities. Citing frustration as his defence, the developer then told the affected non-Bumiputra purchasers that he had to abort the sale and purchase agreements with them. The court held that the developer was liable in damages and that the terms of approval imposed by the authorities could not, in law, be deemed to frustrate the contract between the developer and the affected Bumiputra purchasers. Despite opinions to the contrary, it is doubtful whether the conditions of approval imposed by the State Authority in the instant case could be regarded as being unconstitutional (see Visu Sinnadurai 1984 at pg. 46).

Section 301 (c) of the NLC provides that :

"An instrument shall be fit for registration under this Part if, but only if, the following conditions are satisfied -

- (a)
- (b)
- (c) *that the dealing which it effects is not contrary to any prohibition or limitation imposed by this Act or any other written law for the time being in force, or to any restriction in interest (emphasis added by the writer) to which the land in question is for the time being subject";*

Thus the effect of non-compliance with the restriction in interest imposed on the land, for example, where land endorsed with the restriction in interest to the effect that that it could not be transferred to a non-Bumiputra unless prior approval is obtained from the State, but the owner nevertheless, sells the land to a non-Bumiputra without approval from the State Authority, then the transfer cannot be registered as it is not fit for registration. In other words, the effect of non-compliance with the restriction in interest will render the transaction null and void as it is incapable of registration. However, failure to fulfill any of the conditions imposed on the land shall constitute a breach of condition and the land will become liable to forfeiture to the State Authority (section 127 (1) (a) of the NLC) or the proprietor liable to a penalty in the form of a fine (section 127 (1A)). Therefore, it is observed that failure to fulfill any of condition imposed by the State Authority and non-compliance of the restriction in interest gave rise to different legal implication.

The latest form of restriction on landownership is the restriction of foreign ownership of landed properties introduced via the 1992 Amendment to the National Land Code and came into force on January 1, 1993. The 1992 Amendment re introduced Part 33A which was repealed in 1987. Part 33A was first introduced in a slightly different form in 1984. Before 1984, the NLC itself imposed no restrictions or bans on the sale of any categories of land to foreigners. The 1984 amendment imposed a total ban on the sale of lands under the "agriculture"

category but there were no restrictions on transaction of industrial lands. However, under the present Part 33A, there is no total prohibition on any category of land. Again there is no restriction whatsoever on industrial land. But transfer of agricultural, commercial and residential properties to foreigners, whether individuals or companies requires written approval from the State Authority.

Attention now is likely to be focused on Johor. Johor with its rapid industrialisation program and its proximity to Singapore has attracted many foreign investors purchasing not just industrial lands but residential, agricultural and commercial lands as well. Statistics shows that in the last five years, foreign nationals and companies owned a total of 5,615 hectares of land in the state (Zalil Baron, conference paper 1993). Due to this widespread selling of landed properties to foreigners especially Singaporeans, Johor Bahru properties became "hot properties" resulting in a boom in its property market which in turn brought negative repercussion to the locals, in the form of soaring cost of living, highest inflation rate in the country, traffic congestion problem and exorbitant real property values. This has prompted the State Government to make proposals to the Federal Government to amend the NLC to restrict foreign purchase of certain plots of land in the state.

Part 33A has been implemented for over a year now. What effect does it have on the property development? Different states viewed Part 33A differently. Generally, in line with the country's national objectives of industrialisation, all agreed that there should be no restrictions on transactions on industrial lands. With the other categories of land State sentiments were mixed. It was reported that the Johor state government had finalised its own set of guidelines on foreign ownership which sets a quota of foreign ownership in particular housing schemes and decided not to follow the RM80,000/- price ceiling eligibility set by the Foreign Investment Committee (a body formed by the Federal Government to regulate and control private sector investment - both local and foreign-in the country).

Restrictions Imposed by Other Laws and Regulation

Other forms of restriction on ownership of land imposed by other laws, are the Malay Reservation Enactments of the respective Malay states, the National Land Code (Penang and Malacca Titles) Act 2/1963, Customary Tenure Enactment (FMS Cap. 215), Land (Group Settlement Areas) Act 1960, and the Aborigines Peoples Act 1950. These legislations serves to preserve land within the possession of a certain groups of people. However, the Malay reservation law became one of the species of the country's laws which was "entrenched" by the Federal Constitution (Article 89). Being closely identified with the special rights of the Malays, any change in the Malay Reservation Law requires not only the two-thirds majority vote of the people's representatives in both the State and the Federal legislature, but also the concurrence of the Conference of Rulers.

Malay reservation land refers to that special category of land situated within the territorial boundaries of each state in Peninsular Malaysia which can only be owned or held by Malays. The State Authority, in exercising its powers of disposal under the Code, can alienate such lands only to Malays, and what constitutes a "Malay" depends on the definition and interpretation of that term as determined in the respective State legislations. Dealings in respect of such lands, such as transfers, leases, charges and easements, can only be transacted amongst Malays, and any attempts by non-Malays in dealing with such Malay reserve lands will be held null and void.

The objectives of these legislations are in general, to protect the interest and landownership of Malays and to ensure that certain land is alienated and remain within this class. The reservation of land for a particular ethnic group is not unique to multi-racial Malaysia on account of economic and political reasons.

Another form of restriction in landownership is in the form of regulations issued by the Foreign Investment Committee (hereinafter referred to in its abbreviated form as "FIC"). This Committee formed in 1974 under the

Economic Planning Unit (EPU) of the Prime Minister's Department acts as the government's watchdog in regulating private sector investment by both the local and foreign investors in the country. In controlling the acquisition of fixed asset by foreigners in the country, the FIC approval is required for every purchase of real property, regardless of price. Thus, prior to registration of the transfer, the purchaser must have a certificate from the FIC approving the purchase and this certificate is attached to the Memorandum of Transfer to be submitted to the Land Office. The FIC tightened the rules governing foreign property ownership in April 1992 by reinforcing its February 1974 guidelines by sending letters to all housing developers and the Bar Council stating that under the 1974 guidelines, all foreign purchases including terrace units, bungalows, apartments and condominiums require its approval. These changes were subsequently attacked by investors, developers, lawyers and property consultants as being so vague that they frightened away potential investors. The FIC relaxed some of these guidelines last December, which can be summarised as follows :

1. Condominiums units costing more than RM300,000 will no longer be subject to conditions on use or length of ownership. However, approval of the FIC need to be obtained for such acquisition.
2. Foreign individuals and companies cannot buy residential property worth less than RM80,000.
3. Acquisition of a shop house must be made by a company that is at least 70% owned by locals.
4. Foreigners may buy only one unit of residential property for his own use or investment.
5. If foreigners want to buy more than one property, it must be done through a local company with at least 70% Malaysian equity.
6. Condominiums and apartments between RM80,000 and RM300,000 - foreigners may purchase for owner-occupation; cannot be resold within three years of purchase. If it was rented out, then, it cannot be resold within five years of purchase.
7. Bungalows worth more than RM500,000 : foreigners may purchase for owner occupation; cannot be resold within three years of purchase. If properties purchased were rented out by owners to tenants, they cannot be resold within five years of purchase.
8. Bungalows worth RM80,000 to RM500,000 : foreigners may purchase for owner-occupation; cannot be resold within three years of purchase.
9. Terrace houses and link houses worth more than RM200,000 : foreigners may purchase for owner-occupation; cannot be resold within three years of purchase. If rented out, cannot be resold within five years of purchases.
10. Terrace houses and link houses worth between RM80,000 and RM200,000 : foreigners may purchase for owner-occupation; cannot be resold within three years of purchase and cannot rent out the property.

The irony of the role of the FIC in the approval of property acquisition by foreigners is that the law prior to the 1992 Amendments freely permits foreign ownership. This contradiction is further highlighted since FIC was not formed pursuant to any Act of Parliament but merely as a government watchdog to oversee that local interests are protected. Its role is to monitor and ensure that compliance with the New Economic Policy. In the Federal Court case of David Hey v. New Kok Ann Realty Sdn. Bhd. (1985) 1 MLJ 167 even though the Court expressed its willingness to regard the guideline as public policy and not merely political policy, it did not expressly state that the guidelines have the force of law. Moreover, as registration of land ownership is a state matter, the role and authority of the FIC in imposing conditions and restrictions at its discretion when approving acquisition by foreign nationals is questionable. It was reported that the Johor Government will announce its own guidelines on foreign ownership and chooses to differ with that set by the FIC. Thus, now lies the question as to whether the rules of a State supersede the fiat pronounced by a body with federal powers such as the FIC? According to the Director

General of Land and Mines Malaysia, the FIC guidelines are merely administrative in nature and have no legal standing and the State Authority may register land in favour of the foreigners even if the guidelines are not complied with. As to date no uniform set of guidelines on foreign ownership of properties has been issued.

Conclusion

The housing and property development sector has always been one of the major contributor to the continued buoyant growth of Malaysia. Over the last few years since the late 70's, our once green countryside has changed its shape, contour and colour. What was once green lush vegetation is now barren earth; and if one can find the time to pause in one's journey, one finds oneself gazing at what has been called "industrial parks". In some States, they even have industrial parks for different investor-nationalities, e.g. Taiwanese industrial parks, Korean industrial parks, etc. At the other end of the scale, what was once old lush greenery comprising of half dead and abandoned rubber trees and oil-palm estates had been miraculously transformed into rolling meadows of neatly trimmed grass, the much-favoured 18 or 36-hole golf courses. Thus, agriculture does not seem to be high on the priority list of most states. In contrast, industrial parks and the leisure industry is now every development planner's cup of tea. Circumstances and perceptions are changing: so must the law. In lieu of the present growth in its property sector and also its future development, for eg. Johor proposed mammoth and innovative project i.e. a new township built on water, the law with regards to categories of land in Malaysia need to be change by adding to the three traditional categories a fourth category of land depending upon the particular need of the development. As has been pointed earlier on this paper, the diversity in property development procedures from one State to another, due to alternative procedures under the Code which have resulted in causing confusion to developers, legal practitioners and entrepreneurs called for an amendment to the NLC so as to provide a uniform procedure for land development.

On the other hand, restrictions imposed by laws and regulations are viewed by property experts as a discouraging factor which hinders development for eg. there were no written guidelines as to the State Authority's power of approval for transfer to foreigners. It is also observed that the restrictions were not governed by any statute but merely depended on political and socio-economic consideration prevalent at the time. The wide discretionary powers of the State Authority in imposing the various restriction may lead to abuse of power. The changing rules and regulations mid-stream has resulted in uncertainty which in turn would drive investors - local and foreigner - away from Malaysia. However, from social-sciences and the consumer point of view, these restriction should not be viewed only from economic perspective only. It must be looked at from the social, political, cultural, moral environmental and legal perspectives. Malaysia in her desire to encourage foreign investment in the country, have exercised a liberalised policy as regards to foreign land ownership since her independence from the British colonization in 1957. The law did not even impose any limitation as to the number of and acreage of land that can be acquired by a foreigner. Thus, the citizen and foreigner have equal right and opportunity to own land in the country, except the Malay Reservation land. The inadequacy of the laws and policies restricting foreign ownership have prompted the Federal Government to pass the 1992 Amendment to the NLC. The re-introduction of Part 33A repealed in 1987, highlight the element of "social sensitivity" of the legislation to the demands of its rakyat. Similar to the repealed 1984 Act, it confers wide powers of approval on the State Authority to alienate or approve transfer of land to foreigners. Therefore, what is needed is for each State to have clear cut, comprehensive policies and guidelines which will serve the interest of all - locals, foreigners, the State itself and the nation.

There is undoubtedly a need of achieving a balance between the importance of foreign investment in the country on the one hand, and the need to safeguard local interest on the other. The fact that Malaysia's rapid economic expansion in the last few years which was mainly fuelled by these foreign investments, should not be the one and only consideration for continuing with the liberalised policy. The need to ascertain that local interests are safeguarded should also be given consideration. Otherwise, all the time, effort and money pumped in by the Government to the implementation of the safeguards conferred by Article 153 of the Federal Constitution protecting the special interest of the Malays, and efforts to eradicate poverty of Malaysians and the restructuring of Malaysian

society by correcting the economic imbalances through the New Economic Policy, would be put to waste. In other words, the whole exercise would be meaningless.

REFERENCES

1. Adibah Awang, "A Study on Landownership by Non-Citizens in Johor Bahru", Master of Comparative Law dissertation, Petaling Jaya : International Islamic University (1992) (Unpublished)
2. Ahmad Hj. Hashim, "Garis-garis Panduan Jawatankuasa Pelaburan Asing Mengenai Perolehan Rumah-Rumah Kediaman oleh Kepentingan Asing", Seminar on Amendments to the NLC 1992 : Its Implications on Property Development, Skudai, Johor, January 19- 20, 1993, UTM
3. Nik Abdul Rashid Nik Abdul Majid, "Issues on Property Development following the Amendments of the NLC", Seminar on Amendments to the NLC 1992 : Its Implications on Property Development, Skudai, Johor, Jan. 19-20 1993, UTM
4. Nik Mohd. Zain Yusof, "Land Ownership Policies", Commercial Property Transactions and Land Ownership Policies Seminar, Johor Bahru, January 20, 1992, Centre for Management Technology
5. Salleh Buang, Associate Prof., The Malaysian Torrens System, Kuala Lumpur, Dewan Bahasa dan Pustaka (1989)
6. Teo Keang Sood and Khaw Lake Tee, Land Law in Malaysia Cases and Commentaries, Singapore: Butterworths (1987)
7. Property Market Reports 1986, 1987, 1988, 1989, 1990, 1991 and 1992 Kementerian Kewangan Malaysia
8. Sixth Malaysia Plan 1991-1995, Kuala Lumpur : Jabatan Cetak Kerajaan
9. Federal Constitution
10. National Land Code 1965